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United States Department of the Treasury Customs Service, Washington, DC and National Treasury Employees Union

59 FLRA 703

Federal Labor Relations Authority

59 FLRA No. 128

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Related Index Numbers

41.4 Bargain Collectively

41.43 Bargain Collectively, Duties and Obligations of Parties

41.441 Bargain Collectively, Procedure, Ground Rules

41.445 Bargain Collectively, Procedure, Notification

41.14 Type of Bargaining, Impact and Implementation

Judge / Administrative Officer

Dale Cabaniss, Carol Waller Pope and Tony Armendariz

Appealed from 103 LRP 2517

Ruling

The FLRA set aside the arbitration award that required the agency bargain its decision to reassert control over key work assignment issues. The union insisted on bargaining matters not directly related to the issue. Therefore, the agency was not required to bargain.

Meaning

The agency proposed a specific change in employees' conditions of employment. Under 5 USC 7106 management had this right and was required to bargain its decision. The union insisted the agency bargain other matters. The union's proposed ground rule constituted a permissive subject of bargaining. Therefore, the agency was not obligated to bargain on that subject as a precondition to impact and implementation of the revised nationwide inspectional assignment policy.

Case Summary

The agency notified the union that the nationwide inspectional assignment policy had expired. It planned to implement a revised nationwide policy. This was necessary due to the terrorist attacks of Sept.11, 2001, the agency claimed. The attempt to change the conditions of employment was not permitted, the union argued. It requested the agency not implement any changes in working conditions until an agreement was reached. Thereafter the union claimed other articles needed to be negotiated at the same time.

The FLRA ruled that the agency's implementation of the revised NIAP did not violate 5 USC 7116(a)(1) and (5) as the union alleged. The union had waived through inaction its right to bargain by insisting on a non-mandatory topic of bargaining, rather than seeking to negotiate proposals within the duty to bargain. The union's proposed ground rule constituted a permissive subject of bargaining. The union attempted to broaden the bargaining beyond the narrow scope of issues related to the procedures and appropriate arrangements governing implementation of the revised NIAP. It exceeded the scope of impact and implementation bargaining. Therefore, the agency was permitted to unilaterally execute its proposed change to conditions of employment.

Member Carol Waller Pope concurred that the award was contrary to law -- but for a different reason. FLRA precedent established that during impact and implementation bargaining, an agency is only required to bargain over "proposals that are reasonably related to the proposed change."

Full Text

Decision

I. Statement of the Case

This case is before the Authority on exceptions to an award of Arbitrator Earle W. Hockenberry filed

by the Agency and the Union under § 7122 (a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union and the Agency filed oppositions to each other's exceptions.

The grievance alleged that the Agency violated § 7116(a)(1) and (5) of the Statute by the manner in which it revised and implemented its assignment policy. The Arbitrator found that the Agency acted improperly by failing to negotiate with the Union prior to implementing changes in that policy and ordered the parties to engage in prospective bargaining on the matter.

For the following reasons, we find that the Agency did not violate the Statute. Accordingly, we grant the Agency's exceptions and set the award aside.

II. Background and Arbitrator's Award

A. Background

The Union represents a nationwide unit of Customs Service employees, including Customs Service inspectors. The parties have negotiated a series of national level agreements (NLA), the last of which expired in 1999. Although the parties bargained on a replacement for that agreement, they were unable to complete bargaining.[3] In the absence of a new term agreement, the parties continued to adhere to the terms of the expired agreement.

In 1993, Congress passed the Customs Officers Pay Reform Act (COPRA), 5 U.S.C. § 261, which revised the overtime system for customs inspectors. In order to implement COPRA, the parties established a joint labor-management committee to develop policies governing the assignment of inspectors to tours of duty and overtime work. In 1995, the work of this committee resulted in the National Inspectional Assignment Policy (NIAP). The NIAP also provided for negotiations at the local level over Local Inspectional Assignment Policies (LIAPs) which would address staffing practices based on the specific needs of each port. The NIAP was developed independently of the NLA.[4]

The parties' expired NLA provided, in Article 5, Section 2, as follows:

In the interest of partnership, the Employer agrees to bargain with the Union over the numbers, types and grades of employees or positions assigned to any Customs Service organizational subdivision, work project or tour of duty, and the technology, methods and means of performing work within the Service.

Award at 3. On July 18, 2001, following the issuance of Executive Order (E.O.) 13203,[5] the Agency advised the Union that it would no longer negotiate over permissive subjects of bargaining as required by Article 5, Section 2 of the NLA.[6] On August 2, 2001, the Agency also advised the Union that it would no longer be bound by the provisions of agreements which pertained to permissive subjects and transmitted to the Union a draft of a revised NIAP (revised NIAP). The Agency informed the Union that it intended to implement the revised NIAP on September 30, 2001.

On August 6, 2001, the Union invoked its right to negotiate over the impact and implementation of the Agency's decision to change the NIAP. Further, the Union indicated that it was serving notice of its intent to renegotiate the NLA. On August 16, 2001, the Agency reiterated its desire to commence and conclude negotiations on the revised NIAP prior to its intended implementation date of September 30, 2001. The following day, the Union informed the Agency that it intended to reopen negotiations on a number of provisions in the NLA, contending that most of those provisions had a direct connection to the NIAP and the Union's bargaining rights under § 7106 (b) (1).

On August 22, 2001, the Agency responded that it was prepared to negotiate ground rules for the proposed impact and implementation negotiations, consistent with Article 37 of the expired NLA. In a letter dated the following day, the Union informed the Agency that it could not negotiate on any matters under discussion until ground rules were agreed upon. In response, the Agency reiterated its belief that Article 37 of the expired agreement contained ground

rules for negotiating management-initiated changes. On August 29, 2001, the parties met to establish ground rules but were unable to reach agreement.

The parties again exchanged correspondence on August 31. The Agency reiterated its position that it wished to implement the revised NIAP on September 30 and requested that the Union submit proposals relating to that matter. The Union reiterated its position that the subject of the revised NIAP should be addressed in conjunction with the term agreement negotiations. Additionally, the Union submitted a set of proposals pertaining to the revised NIAP. In essence, the proposals required that the terms of the NIAP be retained.[7]

On September 6, the Agency responded that delaying implementation of the revised NIAP was unacceptable. The Agency stated that it would not put off implementation of the NIAP until the parties completed renegotiation of the NLA. The Agency also indicated that, notwithstanding its intent to implement the revised NIAP, it was willing to discuss the revised NIAP during term negotiations. *See* JE R.

The Union sought assistance from the Federal Mediation and Conciliation Service (FMCS) concerning the parties' disagreement over ground rules. The parties were unable to reach agreement following a meeting with a mediator from the FMCS. On September 21, 2001, the Union requested assistance from the Panel, claiming that the parties were at impasse over the Union's proposal to simultaneously negotiate on the revised NIAP and the NLA.[8]

On October 1, the Agency implemented the revised NIAP. The Union subsequently filed a grievance alleging that the implementation of the revised NIAP violated the NIAP, § 7116(a)(1) and (5) of the Statute, and various provisions of the parties' agreement. After the parties could not resolve the grievance, it was submitted to arbitration.

B. Arbitrator's Award

The parties did not stipulate to the issues in the case, so the Arbitrator formulated the issues as follows:

1. Did the Customs Service violate 5 USC Section 7116, the NIAP, and/or the parties' Agreement as claimed in the grievance. ...

2. If so, what shall be the remedy?

Award at 7.

The Arbitrator found that the NIAP was a product of negotiation between the parties and that it could not be "revised in a manner that is dissimilar from [the process] which brought it into being." *Id.* at 9. Consequently, the Arbitrator ruled that he "[wa]s not convinced" that the Agency was entitled to amend the NIAP "solely as an exercise of its management rights" and that it was reasonable to infer that "negotiations between the parties were required in order to change the terms of the ... NIAP." *Id.*

The Arbitrator further determined that the parties were not at impasse, but, instead, were attempting to resolve the issues between them, including how the negotiations were to proceed. He concluded that "the negotiation process should be allowed to proceed until the parties have reached an agreement across the table or genuinely have exhausted the bargaining process." *Id.* at 10.

The Arbitrator rejected the Agency's argument that the terrorist attacks of September 11, 2001, created an emergency situation which allowed implementation of the revised NIAP without negotiation. In so ruling, the Arbitrator stressed that the Agency sought to implement the revised NIAP as part of its efforts to halt the illegal drug trade and that, even before the terrorist attacks, the Agency had proposed implementing the revised NIAP on October 1.

As a remedy, the Arbitrator found that "the parties acknowledge that an order for prospective bargaining is appropriate." *Id.* He also found that a return to the status quo that existed previously was impractical under the circumstances, stating that "[s]uch an order would cause severe disruption of the Agency's operations and affect public safety and security." *Id.* Consequently, the Arbitrator remanded

implementation of the revised NIAP to the parties for further negotiations consistent with law and the parties' agreement.

III. Positions of the Parties

A. Agency's Exceptions

The Agency first claims that the award is contrary to law. Specifically, the Agency argues that the Arbitrator erred as a matter of law in finding that it implemented the revised NIAP without completing bargaining. The Agency maintains that, by its inaction, the Union waived its right to bargain. According to the Agency, it complied with its legal obligation to notify the Union of its intent to implement the revised NIAP and provided the Union with an opportunity to bargain over that change in conditions of employment. The Agency asserts, however, that the Union never offered negotiable proposals. The Agency acknowledges that the Union proposed, essentially, that the NIAP be maintained, but contends that the Union's basic proposal was that the revised NIAP and the NLA be negotiated together. The Agency claims that this proposal effectively controlled the implementation of the revised NIAP and maintains that matters pertaining to the timing of the exercise of management's rights are nonnegotiable.[9]

Moreover, the Agency contends, the Union's proposed ground rule did not address the change proposed because it concerned negotiation of the NLA and not the revised NIAP. The Agency maintains that ground rules for negotiating the revised NIAP, a management-initiated policy, were contained in Article 37 of the NLA, which the parties had agreed to apply after it had expired. The Agency argues, based on these facts, that it "was not oblig[ated] to maintain the status quo" pending the completion of bargaining on the revised NIAP, but was free to implement as planned. Exceptions at 36. In this regard, the Agency concludes that "the Union had effectively waived its opportunity to bargain by pursuing a non-mandatory topic of bargaining to the point of purported impasse, while failing to even discuss those few proposals it had identified that were within the duty to bargain." *Id.* Thus, in finding that the Agency failed to bargain as required over implementation of the revised NIAP, the Agency claims the Arbitrator did not follow applicable case law pertaining to the duty to bargain and, in this regard, his award is deficient.

Next, the Agency contends that even if the Union did not waive its right to bargain over implementation of the revised NIAP, the award is contrary to law because the Agency was entitled to implement the revised NIAP to maintain the necessary functioning of the Agency. In this regard, the Agency notes that it had originally intended to implement the revised NIAP to facilitate its drug-interdiction mission, but that the terrorist attacks of September 11, 2001, required the flexible work assignment procedure provided in the revised NIAP in order to enable Agency managers to detect and prevent possible terrorist activity. The Agency notes, as support, that the President had declared a state of national emergency, and that it had placed its own operations on a Level One emergency alert, the highest alert status.[10]

The Agency also notes that the Arbitrator did not specifically address its "necessary functioning" argument, but contends that his award fails to comply with the requirements of the Statute in that regard and is therefore deficient.

The Agency argues, in addition, that the award is contrary to law because the Arbitrator did not correctly apply § 7106(a)(2)(D) of the Statute. The Agency asserts that "the unprecedented, horrific terrorist attacks of September 11, 2001, and the credible and continuing threat of further terrorist actions, created a situation that qualifies as an emergency within the meaning of" § 7106(a)(2)(D). Exceptions at 43. As support, the Agency references the Declaration of Emergency and argues that the Arbitrator's failure to recognize the emergency declared therein renders his award contrary to § 7106(a)(2)(D).

The Agency also contends that the award fails to

draw its essence from Article 37, Section 4 of the NLA because the Union's proposals addressed matters not related to the revised NIAP.[11]

The Agency claims as well that the Arbitrator exceeded his authority in failing to find that Article 37 of the NLA governed the Union's response to the revised NIAP. In the Agency's view, the Arbitrator's failure to address the clear language of Article 37 means that the Arbitrator exceeded his authority by not addressing an issue submitted to him.

Finally, the Agency asserts even if it violated the Statute or the NLA in implementing the revised NIAP, the Arbitrator appropriately did not order a status quo ante remedy or a back pay award. According to the Agency, "any type of status quo remedy requiring predecisional involvement from [the Union] would compromise national security in a post[-September 11] environment." *Id.* at 51.

As to the issue of back pay, the Agency contends that the Union cannot demonstrate that there was any loss of pay by affected employees as a result of the revised NIAP.

B. Union's Opposition

The Union disputes the Agency's claim that it waived its right to bargain over the revised NIAP. According to the Union, under Authority precedent, it would have waived its bargaining rights by inaction if it had failed "to request or pursue negotiations after receiving adequate notice from the [A]gency of a planned change in" conditions of employment. Opposition at 24. The Union notes that the Arbitrator found that: (1) 4 days after it received notice of the Agency's intent to implement the revised NIAP, the Union requested bargaining on that matter; (2) subsequently the Union limited its request to bargain to articles of the NLA with a direct connection to the revised NIAP, denominated them counterproposals, and later essentially proposed, in addition, to rollover the NIAP; and (3) the parties were engaged in bargaining, and had not reached impasse, when the Agency implemented the revised NIAP. Further, the Union maintains that its proposal to negotiate the revised NIAP in connection with renegotiation of the NLA was "not a proposal designed to delay or to hold in abeyance the Agency's plan," but "a proposal on how to conduct the bargaining." *Id.* at 34. The Union asserts that the requirement that the Agency "maintain the status quo and refrain from implementing pending bargaining is a responsibility statutorily imposed" upon the Agency. *Id.* at 35.

As to the Agency's "necessary functioning" exception, the Union asserts that the Agency failed to offer affirmative proof, as required under Authority precedent, that its unilateral action was in fact consistent with the necessary functioning of the Agency. According to the Union, "[t]he record more than supports the Arbitrator's finding that the Agency did not? prove 'necessary functioning' as a basis for violating the status quo required under the law." *Id.* at 43.

With respect to the Agency's § 7106(a)(2)(D) exception, the Union claims that "the Agency must prove with evidence in the record that an emergency existed such that it needed to implement ... unilaterally [the] change in working conditions in order to carry out its mission." *Id.* at 44. According to the Union, the Arbitrator rejected the Agency's § 7106(a)(2)(D) claim because he found that the events of September 11, 2001, did not establish an emergency justifying an action that was proposed in July 2001 and implemented on October 1, 2001. Moreover, the Union asserts, the presidential Declaration of Emergency did not by its terms suspend Federal agencies' statutory labor relations obligations.

C. Union's Exceptions

The Union claims that the Arbitrator's failure to award the relief requested by the Union is contrary to law. Specifically, the Union argues that the Arbitrator committed reversible legal error by applying the criteria set forth in Fed.Corr.Inst., 8 FLRA 604 (1982) (FCT), to determine if a status quo ante remedy was appropriate to remedy the unilateral implementation of the revised NIAP.

The Union asserts that the Agency was required to bargain over the substance of its decision to implement the revised NIAP because the revised NIAP included changes to previously-negotiated assignment procedures and arrangements. The Union also states that the revised NIAP "contained provisions substantially revising or eliminating portions of enforceable provisions of the" NLA. Union Exceptions at 17. The Union states specifically, "because the change under consideration did not involve the exercise of management rights under [§] 7106(a) or 7106(b) of the Statute, negotiation of the decision -- not impact and implementation bargaining -- was required."[12] *Id.* at 38.

Instead, the Union claims that the Arbitrator should have granted a status quo ante remedy because the Arbitrator correctly found that the substance of the decision to implement the revised NIAP was negotiable. Under those circumstances, the Union asserts that, in the absence of special circumstances, a status quo ante remedy is required.[13]

Additionally, *citing* AFGE, Council 220, *et al. v. FLRA*, 840 F.2d 925 (D.C. Cir. 1988), the Union argues that even if the Arbitrator properly denied its request for a status quo ante remedy, there was no warrant for also denying back pay to employees. In this regard, the Union notes that "the Arbitrator failed to make any findings or express his rationale for denying the routine make-whole remedy" and asserts that u[t]his failure is, in and of itself, error." Union Exceptions at 53.

Finally, the Union excepts to the Arbitrator's failure to require the Agency to post a remedial notice. The Union argues that postings serve a critical role in effectuating the purposes of the Statute and that the failure to order such a posting was erroneous.

D. Agency's Opposition[14]

In response to the Union's exceptions, the Agency points out, initially, that "the [A]rbitrator never explicitly ruled that the Agency had violated either the Statute" or the NLA. Agency's Opposition at 2. Emphasizing its own exception, the Agency contends that because "the Union waived its right to negotiate on the revised NIAP, there is no basis for ordering prospective bargaining, much less a requirement to impose the far-reaching remedies sought by the Union." *Id.* at 2-3.

The Agency contends that the Union errs in its claim that the Arbitrator ruled that the revised NIAP did not constitute an exercise of management's rights and, based on that error, mistakenly concludes that the Agency was required to bargain over the actual decision to revise NIAP. According to the Agency, the Union's argument attempts "to confuse the issue by characterizing impact bargaining over procedures as 'decisional.'" *Id.* at 15. The Agency states that, to the contrary, it was under no obligation to bargain on its decision to rescind its election to negotiate on § 7106(b)(1) matters and concludes that "the decision to modify NIAP itself was not negotiable." *Id.* at 15.

In addition, the Agency maintains that if it did improperly fail to bargain, it did so only with respect to the impact and implementation of the revised NIAP. In this regard, the Agency contends that the Arbitrator properly applied FCI because the record demonstrates that imposition of a status quo ante remedy would unduly affect Agency operations and potentially adversely affect the safety or security of the public.

With respect to the Union's back pay exception, the Agency asserts that it is "entirely speculative" to conclude that employees would have worked additional or specific assignments if the Agency had not revised tours of duty and staffing assignments in order to address the terrorist attacks. *Id.* at 23. The Agency argues, in this regard, that "it must be shown that the employee actually lost pay and not merely the opportunity to work." *Id.* at 24.

Finally, the Agency asserts that because the Arbitrator "did not explicitly rule that the Agency violated either the Statute or the NLA, there is no basis to order a posting." *Id.*

IV. Analysis and Conclusions

The Agency excepts to the Arbitrator's award under § 7122(a)(1) of the Statute on the ground that the Arbitrator erred as a matter of law in finding that it improperly implemented the revised NIAP without completing bargaining.[15] As the Agency's exception concerns whether the award is contrary to law, the Authority's review is de novo. *SeeNTEU,* Chapter 24, 50 FLRA 330, 332 (1995) *(citing United States Customs Serv. v. FLRA,* 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *See United States DoD, Dept's of the Army and Air Force, Ala. National Guard, Northport, Ala.,* 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

In this case, the Agency proposed a specific change in unit employees' conditions of employment pursuant to the exercise of its management rights under § 7106 of the Statute while the parties were contemplating negotiation of a new term agreement. The Authority has not heretofore dealt with issues relating to the parties' bargaining obligations in such circumstances. The specific issue herein is the Agency's legal ability, if any, to refuse to bargain over the Union's proposed ground rule requiring the Agency to combine its proposed impact and implementation bargaining obligation with the negotiation of a term agreement. If the Agency could lawfully refuse to bargain over whether to combine the two negotiation situations into one set of negotiations, then the Union's refusal to engage further in impact and implementation bargaining would permit the Agency to unilaterally implement its proposed change to conditions of employment. Conversely, the Agency would commit an unfair labor practice by its unilateral implementation of the revised NIAP, if it was required to bargain over the proposed ground rule providing for the combination of the two negotiation situations into one set of negotiations.

We conclude that the Union's proposed ground rule constitutes a permissive subject of bargaining and, consequently, that the Agency was under no obligation to bargain on that subject as a precondition to impact and implementation of the revised NIAP. We emphasize, however, that the result herein is not intended to preclude parties from combining bargaining over the impact and implementation of a particular exercise of a management right with bargaining over a term agreement. Because combining bargaining over these two matters is a permissive matter, parties are free to explore various alternatives to achieve that purpose. Rather, this case stands for the proposition that an agency cannot be compelled to bargain over combining impact and implementation and term bargaining and it has the right to insist that such bargaining proceed on separate tracks.

Where an agency action constitutes the exercise of a management right under § 7106(a) or 7106 (b) (1) of the Statute, as does the implementation of the revised NIAP in this case,[16] the agency's obligation is limited to bargaining over the procedures governing the exercise of the right, under § 7106(b)(2) of the Statute, or appropriate arrangements for employees adversely affected by the exercise of the right, under § 7106(b)(3).[17]*See Dep't of the Navy, Marine Corps Logistics Base, Albany, Ga. v. FLRA,* 962 F.2d 48, 50 (D.C. Cir. 1992) *(Marine Corps Logistics Base) (citing United States Dep't of the Air Force v. FLRA,* 949 F.2d 475, 477 & n.2 (D.C. Cir. 1991). This limitation reflects the balance struck by Congress in enacting § 7106. *See Marine Corps Logistics Base,* 962 F.2d at 50 n.l *(citing AFGE, Local 1923 v. FLRA,* 819 F.2d 306, 308 (D.C. Cir. 1987) and *Office of Personnel Management v. FLRA,* 864 F.2d 165, 168 (D.C. Cir. 1988). It is a compromise between management's right to act within certain specified areas and the union's right to provide input into any decision affecting the conditions of employment of employees in its unit of exclusive recognition. *Id.* The intent is to ensure the efficient and effective operation of the Government consistent with the public interest in collective bargaining.

Moreover, the Authority has made clear that, "[w]here a bargaining obligation arises by virtue of an agency changing conditions of employment, the [a]gency is required to bargain only over negotiable proposals addressing those changes." *See United States Dep't of Health and Human Services, SSA, Baltimore, Md.*, 39 FLRA 258, 262 (1991) (*SSA, Baltimore*) *(citing Dep't of Health and Human Services, SSA, Baltimore, Md.*, 31 FLRA 651, 656 (1988)). Consistent with that principle, where, pursuant to a management right under § 7106(a) or § 7106(b)(I) , an agency proposes to change the conditions of employment of unit employees, its bargaining obligation is limited to only those procedures, under § 7106(b)(2), and appropriate arrangements, under § 7106(b)(3), that address the particular change proposed. *See United States Dep't of the Interior, Minerals Management Service, New Orleans, La.* 969 F.2d 1158, 1162 (D.C. Cir. 1992) (under § 7106(b)(3), agency only obligated to bargain over matters that concern the reasonably foreseeable adverse effects of the exercise of a management right under § 7106 and only when the proposed arrangement is tailored to benefit or compensate employees suffering those adverse effects).

Specifically, the United States Court of Appeals for the District of Columbia Circuit held, in *FLRA v. United States Dep't of Justice*, 994 F.2d 868 (D.C. Cir. 1993) (*Dep't of Justice*), that the agency did not violate the Statute by failing to bargain over a matter that was outside the scope of impact and implementation bargaining. The case involved an Authority enforcement action seeking compliance with its order requiring impact and implementation bargaining over the agency's action decentralizing its operations and relocating and remodeling facilities used in those operations.

The court stated, initially, that "impact and implementation bargaining arises as an exception to the management's rights doctrine created by section 7106(a)." 994 F.2d at 871. According to the court, § 7106(b)(2) and (3) provides that § 7106(a) "does not preclude an agency and a labor organization from negotiating "procedures which management officials of the agency will observe in exercising authority' under that section or 'appropriate arrangements for employees adversely affected by the exercise of [such] authority.'" 994 F.2d at 872 *(citing Marine Corps Logistics Base*, 962 F.2d at 50). The court concluded that "by case law and statutory reference, the term 'impact and implementation' includes only" procedures under § 7106(b)(2) and appropriate arrangements under § 7106(b)(3). Id. The court held that "the creation of an office for the [u]nion has nothing to do with the procedures used by management for the resource and personnel allocation involved in the decentralization of the unit." *Id.* The court also declined to extend the scope of appropriate arrangements bargaining to include proposals that do not address "the reasonably foreseeable adverse effects that flow from some management action." *Id. (citing United States Dep't of the Interior v. FLRA*, 969 F.2d 1158, 1162 (D.C. Cir. 1992) (*Dep't of the Interior*).

Because the union's office space proposal did not concern either the procedures governing management's decision, pursuant to its rights under § 7106(a), to decentralize its operations, or appropriate arrangements for employees adversely affected by that decision, the court concluded that it was outside the scope of the agency's obligation to bargain over the impact and implementation of that decision. The court concluded that, by refusing to bargain over that proposal, the agency had not violated the Authority's order and denied the petition for enforcement. We agree with the court's analysis of the scope of impact and implementation bargaining under the Statute and adopt its rationale and its holding.

This limitation on the scope of impact and implementation bargaining is no different when the question, as here, concerns an agency's obligation to bargain over the ground rules for negotiating over the impact and implementation of an exercise of a management right. It is well established that the duty to bargain extends to ground rules for negotiations because "the negotiation of ground rules is part of the

collective bargaining process and the mutual obligation of the parties to negotiate in good faith. ..." *Harry S. Truman Memorial Veterans Hospital, Columbia, Mo.*, 16 FLRA 944, 945 (1984). However, this principle has an important qualification attached. The Authority has emphasized that since "the obligation to bargain over ground rules vis inseparable from the parties' mutual obligation to bargain in good faith, ... a party may not insist on bargaining over ground rules which do not enable the parties to fulfill their mutual obligation.'" *United States Dep't of the Air Force, HQ, AFLC, Wright-Patterson AFB, Ohio,* 36 FLRA 912, 916 (1990) (*Wright-Patterson I*) *(quoting United States Dep't of the Air Force, HQ, AFLC, Wright-Patterson AFB, Ohio,* 36 FLRA 524, 533 (1990) (*Wright-Patterson II*)). In other words, the duty to bargain over ground rules must be consistent with the parties' obligation to bargain in a particular case.

The issue in this case is whether the Union's proposed ground rule is consistent with the parties' mutual impact and implementation bargaining obligations.[18] More specifically, the question is whether the Union's proposed ground rule addresses only procedures or appropriate arrangements relating to the change in conditions of employment proposed by the Agency with respect to the NIAP. Clearly, it does not. The Union proposed, as a condition precedent to bargaining over the impact and implementation of the revised NIAP, that the Agency agree to bargain that matter as a part of bargaining over a new term agreement. *See* Joint Exhibits (JE) E and Q. Based on the record, there is no question but that bargaining over a new term agreement would extend beyond the narrow scope of issues related to the procedures and appropriate arrangements governing implementation of the revised NIAP. Although the Union identified provisions of the NLA that related to the NIAP that it wished to discuss in term negotiations, it also demanded to bargain over other, unrelated provisions of the NLA as well. *See, e.g.,* JE H. For that reason, the Union's proposed ground rule exceeded the scope of impact and implementation bargaining and the Agency had no obligation to bargain over that ground rule.

Moreover, because the Union's proposed ground rule would constitute a waiver of the Agency's right to bargain only over those procedures and appropriate arrangements that address the revised NIAP, it is a permissive subject of bargaining. *See, e.g., United States Food and Drug Admin., Northeast and Mid-Atlantic Regions,* 53 FLRA 1269, 1274 (1998); *FDIC, HQ,* 18 FLRA 768, 771 (1985) (proposal requiring party to waive a statutory right is a permissive matter). Further, because the Union's proposed ground rule constitutes a permissive matter, the Agency had a right not only to refuse to bargain to impasse over the matter, but also to implement the revised NIAP without completing bargaining.[19] *See, e.g., United States Dep't of Justice, Fed. Bu. of Prisons, FCI Danbury, Danbury, Conn.,* 55 FLRA 201, 206 (1999) ("A party's right to terminate unilaterally a permissive bargaining subject is not contingent on first satisfying a bargaining obligation as to the substance, impact or implementation of the change."); *United States Dep't of Veterans Affairs, Medical Center, Lexington, Ky.,* 54 FLRA 429, 435 (1998); *Dep't of Health and Human Services, Washington, D.C. and Dep't of Health and Human Services,Region X, Seattle, Wash.,* 19 FLRA 73, 74 (1985). *See also United States Dep't of Housing and Urban Development,* 58 FLRA 33, 34 (2002) (if pending proposals are outside duty to bargain, an agency does not violate the Statute by implementing a change without bargaining over those proposals). More particularly, because the Union had conditioned bargaining over the impact and implementation of the revised NIAP on the Agency bargaining over a new term agreement, a matter outside the scope of the Agency's impact and implementation bargaining obligation, the Agency did not violate the Statute by implementing the revised NIAP on October 1, 2001.[20] *See SSA, Baltimore.*

We note the following observation by the court in *Marine Corps Logistics Base*:

By ascribing certain management rights to

agencies, but tempering those rights through the requirement of impact and implementation bargaining, Congress sought to strike a compromise between an agency's need to manage itself efficiently and the employees' right to participate in the decisions that affect them.

Marine Corps Logistics Base, 962 F.2d at 50 n.l *(citing AFGE, Local 1923 v. FLRA,* 819 F.2d 306, 308 (D.C. Cir. 1987)). The court went on to observe that the "balance struck by Congress is a delicate one" that would be "easily upset by an untoward shift of power to either party[.]" *Id.*

A rule requiring agencies to bargain a ground rule conditioning impact and implementation bargaining on the negotiation of a term agreement in these circumstances would frustrate the compromise reached by Congress in enacting § 7106. In particular, a rule of this nature would not give full effect to the place of management rights in the statutory scheme because it would tie the exercise of a right to objectives that have nothing to do with the purposes for which the right was being exercised. *See Dep't of Justice,* 994 F.2d at 872 *(citing Dep't of the Interior,* court notes it has declined to extend scope of § 7106(b)(3) to include proposals that not designed for purpose of addressing adverse impact of exercise of management right). In short, Congress established the appropriate weight to be given management rights in impact and implementation bargaining by requiring that it be focused solely on the reasonably foreseeable changes resulting from the exercise of a management right. *Id.*

Conversely, if unions could condition impact and implementation bargaining on the negotiation of unrelated matters, the increased bargaining power available would exceed the latitude given unions by Congress in that scheme. The resultant delay would serve no useful purpose in accomplishing the statutory goal of an effective and efficient Government. *See, e.g., Dep't of the Treasury, BATF v. FLRA,* 857 F.2d 819, 822 (D.C. Cir. 1988) (time required to implement proposed process inconsistent not only with management right, but with the Statute's "larger goal of promoting 'an effective and efficient Government'"). The Authority has recognized the adverse consequences of such ground rules bargaining: "ground rules proposals must, at a minimum, be designed to further, not impede, the bargaining for which the ground rules are proposed." *Wright-Patterson II,* 36 FLRA at 533. Moreover, it would be exceedingly anomalous if a union could achieve through ground rules bargaining an expansion of negotiations that it could not accomplish through bargaining over procedures and appropriate arrangements.

This principle is designed to protect the bargaining process, consistent with the purpose of the Statute that collective bargaining facilitates the public interest in an effective and efficient Government. Moreover, it is a principle that protects the interests of both parties, as such a tactic could be employed by either party. *See, e.g., Wright-Patterson I and II.*

In sum, the Agency did not violate the Statute in implementing the revised NIAP. The implementation of the revised NIAP constituted the Agency's exercise of its rights under § 7106(a) and § 7106(b)(1) of the Statute. As such, the Agency was not obligated to bargain over its decision. Rather, the Agency was obligated to bargain only over procedures which the Agency would observe in implementing the revised NIAP (§ 7106(b)(2) of the Statute) and appropriate arrangements for employees adversely affected by the Agency's decision to implement the revised NIAP (§ 7106 (b) (3) of the Statute). Stated otherwise, the Union's right to bargain in this case was limited to the impact and implementation of the proposed changes in the NIAP.

The Union's ground rule proposal conditioned negotiations over the impact and implementation of the revised NIAP on first bargaining over the expired master collective bargaining agreement. This proposal was not a matter falling within § 7106(b)(2) or § 7106(b)(3) of the Statute with respect to the implementation of the revised NIAP. As such, the proposal constituted a permissive subject of bargaining as to which the Agency could have

elected, but was not obligated, to bargain. The Agency's implementation of the revised NIAP, in the face of a proposal over which it was not obligated to bargain, was, therefore, not a violation of the Statute. Because the Arbitrator erred as a matter of law in finding that the Agency improperly implemented the revised NIAP, his award must be set aside.[21]

V. Decision

The award is set aside.

[1]Pursuant to the Homeland Security Act of 2002 (Pub. L. 107-296; 6 U.S.C. § 101 et seq.), the United States Customs Service transferred to the United States Department of Homeland Security, Customs and Border Protection. *See* 6 U.S.C. § 203(a)(1).

[2]Member Pope's concurring opinion is set forth at the end of this decision.

[3]In July 2000, the parties began negotiations to replace the expired NLA. The parties failed to reach agreement and the matter was submitted to the Arbitrator herein. The Agency declined to accept the Arbitrator's recommendations and the matter was then referred to the Federal Service Impasses Panel (the Panel). The Panel issued its decision in the case on June 7, 2002. *See* 01 FSIP 153.

[4]However, the NLA also included provisions related to the assignment of work, hours of work or tours of duty, and overtime. *See* Articles 20, 21, and 22 of the NLA. Joint Exhibit (JE) DDD attached to the Agency's Exceptions.

[5]In October 1993, President Clinton issued E.O. 12871, which, among other things, directed agencies to bargain with exclusive representatives of their employees over the permissive subjects of bargaining set forth in § 7106(b)(1), including the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty. In February 2001, President Bush issued E.O. 13203, rescinding the direction to agencies regarding bargaining on § 7106 (b) (1) matters contained in E.O. 12871.

[6]The record also indicates that, insofar as the inspector assignment policy was concerned, NIAP provided for bargaining on § 7106(b)(1) matters to take place at the local level and be set forth in applicable LIAPs. Agency Exceptions (Exceptions) at 12; Union Opposition (Opposition) at 5.

[7]Because the analysis in this decision focuses on the effect of the Union's ground rules proposal, we will not further address the Union's proposals relating to the substance of the revised NIAP.

[8]The Panel ultimately declined to assert jurisdiction over this dispute. *See* Joint Exhibit WW, Panel letter to the parties dated December 12, 2001.

[9]The Agency cites *United States Customs Service, Washington, D.C. v. FLRA*, 854 F.2d 1414 (D.C. Cir. 1988).

[10]The Agency refers to Presidential Proclamation 7463, "Declaration of National Emergency by Reason of Certain Terrorist Attacks," issued on September 14, 2001 (Declaration of Emergency).

[11]Article 37, Section 4 of the parties' agreement provides, in pertinent part, "[T]he Union agrees that any proposals submitted in the context of impact bargaining will be related to the proposed change(s) and will not deal with extraneous matters." Agency's Exceptions at 14 n.3.

[12]The Union also states, in this regard, that "application by the Arbitrator of FCI to the changed tours and schedules was correct" and indicates that the Union accepts "the Arbitrator's denial of [a] status quo ante remedy as to those changes." Union Exceptions at 38.

[13]The Union notes that it accepts the Arbitrator's denial of a status quo ante remedy regarding the tours and schedules changed as a result of the implementation of the revised NIAP, as those changes were made pursuant to management rights under § 7106(a)(2)(B) and 7106(b)(1).

[14]The Union filed a motion requesting that the Authority strike the Agency's Opposition from the record and the Agency filed a statement opposing the motion. The Union failed to request permission under

§ 2429.26 of the Authority's Regulations to file this motion. Consequently, we have not considered the motion or the Agency's opposition thereto. *See AFGE, Local 2408,* 52 FLRA 992, 995 n.5 (1997).

15The Arbitrator framed the issue in this case as whether the Agency's implementation of the revised NIAP violated § 7116 of the Statute, the NIAP, or the parties' agreement. The Arbitrator did not specifically find that the Agency's action constituted a violation of the Statute, the NIAP, or the parties' agreement. However, the parties address the award as if he had found a violation of the Statute, supporting their exceptions and oppositions with references to the Statute and to Authority case law. Accordingly, the analysis will proceed solely in terms of whether the Arbitrator properly found a violation of the Statute and will not address the possible violations of the NIAP or the parties' agreement.

16In this regard, review of the revised NIAP indicates that it constitutes, among other things, criteria governing employee work assignments, under § 7106(a)(2)(B) of the Statute, and staffing patterns, under § 7106(b)(1). The Arbitrator's statement that the Agency was not entitled to revise the NIAP "solely as an exercise of its management rights[,]" Award at 9, indicates that he found the Agency had an obligation to bargain over the impact and implementation of the revised NIAP. The Agency did not deny that it had such an obligation.

17The fact that the Agency's action in this case took place after the expiration of the NLA does not affect the scope of the Agency's impact and implementation bargaining obligation.

18Although the Union submitted specific proposals related to the revised NIAP, it conditioned bargaining over those proposals on agreement to its proposed ground rule.

19We note, in this regard, that the Arbitrator's finding that the parties were not at impasse is of no consequence to this analysis. Because the Union's proposed ground rule was a permissive subject of bargaining, it could not require the Agency to bargain over the matter at all, let alone bargain over it to impasse. In any event, we note that the Union, at least, believed that the parties were at impasse over the ground rules proposal because it sought the assistance of the Federal Mediation and Conciliation Service and the Panel to resolve the dispute.

20Nothing in this decision is intended to suggest that an agency may unilaterally modify provisions of an expired agreement relating to mandatory subjects of bargaining and the facts of this case do not present such an issue.

21In view of this result, it is not necessary to address the parties' other exceptions.

Concurring Opinion of Member Pope:

I agree with majority that the Arbitrator erred in concluding that the Agency violated the Statute when it implemented the proposed NIAP without completing negotiations. However, in my view, this conclusion is amply supported by the application of settled precedent. Accordingly, I write separately.

The precedent necessary to resolve the exceptions in this case is well established. The Authority has held that, during impact and implementation bargaining, an agency is obligated to bargain only over proposals that are reasonably related to the proposed change. *See United States Department of the Treasury, Customs Service, Washington, DC,* 38 FLRA 770, 783 (1990); *Dep't of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio,* 22 FLRA 502, 506 (1986); *AFGE, Local 217,* 21 FLRA 62, 67 (1986); *see also FLRA v. United States Dep't of Justice,* 994 F.2d 868 (D.C. Cir 1993) (agency did not violate Statute by failing to bargain over a matter outside the scope of impact and implementation bargaining). In the specific context of bargaining over ground rules, the Authority has also held that a party "may not insist on bargaining over ground rules which do not enable the parties to fulfill their mutual obligation" to bargain. *United Stated Dep't of the Air Force, HQ, Air Force Logistics Command, Wright-Patterson AFB, Ohio,* 36 FLRA

912, 916 (1990).

The facts in this case amply demonstrate that the Union was conditioning bargaining over the revised NIAP on bargaining over unrelated matters in the term agreement. In particular, in response to the Agency's request to bargain over the revised NIAP, the Union stated that it requested to bargain over 10 articles in the term agreement, that it reserved the right to request bargaining over additional articles, and that the revised NIAP would be incorporated into the term agreement and subject to ratification. *See* Jt. Exh. H. It is clear that some of the specified 10 articles were unrelated to the NIAP.[1] In fact, the Union's own analysis identified only 3 of the 10 articles as related to the revised NIAP. *See* Union Exh. 5 (stating that the revised NIAP affected Articles 20, 21, and 22 of the term agreement). Moreover, the Union subsequently proposed that the parties bargain, in order, over 17 separate subjects. *See* Jt. Exh. N. Significantly, the Union proposed bargaining over 6 separate subjects before the revised NIAP. *See id.*

As the Union was attempting to condition bargaining over the revised NIAP on bargaining over unrelated matters in the expired, term agreement, the Agency did not violate the Statute by implementing the revised NIAP without completing bargaining, and the Arbitrator's award is contrary to law.

Consistent with the foregoing analysis, existing, well-settled precedent resolves the exceptions. For unknown reasons, however, the majority is not content merely to apply precedent and, instead, bases its decision on an unnecessary analysis of irrelevant issues. First, the majority holds that the Union's ground rule constituted a permissive subject of bargaining because it sought to combine term bargaining with impact and implementation bargaining. *See* Majority Opinion at 18. This is wrong. The problem with the proposed ground rule is not that it sought to combine bargaining over the term agreement with impact and implementation bargaining. The problem with the proposed ground rule was that it sought to combine bargaining over unrelated provisions in the term agreement with impact and implementation bargaining. The distinction is important. In this case, for example, it is undisputed that the revised NIAP changed the parties' term agreement.[2] To the extent that these changes concerned mandatory subjects of bargaining, the Agency was required to negotiate over them prior to implementation. *See United States DOJ, INS, Wash., D.C.,* 52 FLRA 256, 260 n.3 (1996); *FAA, N.W. Mountain Region, Seattle, Wash.*, 14 FLRA 644, 647 (1984). Thus, if the Union had limited its bargaining request to related, mandatory provisions of the term agreement, then the Agency would have been required to bargain over these provisions prior to implementing the change.3 Second, the majority builds on its error by describing the Union's proposed ground rule as a "waiver of the Agency's right to bargain only" over procedures and appropriate arrangements that address the revised NIAP. Majority Opinion at 18. This case is about bargaining over unrelated matters; waiver has nothing to do with it.

The scope of an agency's obligation to bargain over changes in conditions of employment is a fundamental labor relations issue, and the Authority owes unions and agencies clear rules that are easy to apply. The majority's decision does not establish such rules. Therefore, while I agree that the award is contrary to law, I do not join the majority opinion.

[1]The Union requested to bargain over Article 4 (Union Rights), Article 10 (Training), Article 12 (Reduction-in-Force), Article 19 (Safety and Health), Article 20 (Assignment of Work), Article 21 (Hours of Work), Article 22 (Overtime), Article 34 (Access to Facilities and Services), Article 35 (Joint Committees and Partnership), and Article 36 (Competitive Selections). Jt. Exh. H.

[2]Specifically, the revised NIAP affected Articles 20, 21, 22, and 37 of the term agreement. *See* Award at 5.

[3]The majority gives a passing nod to the idea that the Agency could not change mandatory provisions in the term agreement without bargaining. *See* Majority Opinion at 19, n.20. The majority also holds, however, that the Agency had "the right to

insist" that term bargaining and impact and implementation bargaining "proceed on separate tracks." *Id.* at 14. Insofar as this holding extends to portions of the term agreement related to the revised NIAP, I disagree for the reasons stated above.

Statutes Cited

5 USC 7122(a)
6 USC 203(a)(1)
5 USC 7116(a)(1)
5 USC 7116(a)(5)
5 USC 261
5 USC 7106(b)(1)
5 USC 7106(a)(2)(D)
5 USC 7106(a)(2)(B)
5 USC 7106(b)(3)

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